

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DeANDRE R. PETTIFORD,	§
	§
Defendant Below-	§ No. 290, 2010
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0812020458
Plaintiff Below-	§
Appellee.	§

Submitted: April 6, 2011

Decided: June 13, 2011

Before **HOLLAND, BERGER, and JACOBS**, Justices.

**ORDER**

This 13<sup>th</sup> day of June 2011, upon consideration of the appellant's opening brief, the State's motion to affirm, the Superior Court's order on remand, and the parties' supplemental memoranda, it appears to the Court that:

(1) The appellant, DeAndre Pettiford, filed this appeal from the Superior Court's summary dismissal of his first motion for postconviction relief. The State filed a motion to affirm the judgment below on the ground that it is manifest on the face of Pettiford's opening brief that his appeal is without merit. After consideration of the parties' submissions, we remanded the matter to the Superior Court for expansion of the record and consideration of the merits of Pettiford's ineffective assistance of counsel claims. The Superior Court issued its expanded

decision on remand and the parties have filed supplemental memoranda in response. After careful consideration of all the issues, the Court finds no merit to Pettiford's appeal. Accordingly, the judgment of the Superior Court shall be affirmed.

(2) The record reflects that a Superior Court jury convicted Pettiford in May 2009 of one count each of second degree forgery, misdemeanor theft, theft by false pretenses, and second degree conspiracy.<sup>1</sup> The Superior Court sentenced Pettiford as a habitual offender to a total period of eleven years at Level V incarceration, with credit for time previously served, to be suspended after serving ten years for one year at Level IV work release. This Court affirmed Pettiford's convictions on direct appeal.<sup>2</sup> Thereafter, Pettiford filed his first motion for postconviction relief, asserting three claims: (i) he was denied his right to the effective assistance of counsel because his attorney had a conflict of interest and because his attorney's performance was deficient; (ii) the prosecutor engaged in misconduct by conspiring to hide defense counsel's conflict of interest; and (iii) the Superior Court abused its discretion and denied Pettiford due process when it failed to hold a hearing inquiring into his counsel's conflict of interest. The Superior Court summarily dismissed Pettiford's petition on the ground that all of

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<sup>1</sup> For a fuller explanation of the evidence at trial leading to Pettiford's convictions, see the Court's decision on Pettiford's direct appeal. *Pettiford v. State*, 2010 WL 891910 (Del. Mar. 12, 2010).

<sup>2</sup> *Pettiford v. State*, 2010 WL 891910 (Del. Mar. 12, 2010).

Pettiford's claims were premised on the incorrect assertion that his defense counsel had a conflict of interest.

(3) After Pettiford filed his opening brief on appeal, the State filed a motion to affirm the Superior Court's judgment. In considering the State's motion, the Court found that the Superior Court had not addressed the merits of Pettiford's claims concerning the deficiencies in his counsel's performance, which were separate from his conflict of interest claim. Accordingly, we remanded the matter to the Superior Court for expansion of the record and consideration of the merits of Pettiford's ineffectiveness claims. On remand, the Superior Court allowed Pettiford to amend his postconviction motion to include additional ineffectiveness claims. The Superior Court thereafter obtained responses from both defense counsel and the State. In a thoughtful, fourteen-page opinion, the Superior Court denied all of Pettiford's claims and returned the matter from remand.

(4) In his supplemental memorandum, Pettiford argues that the Superior Court misconstrued his conflict of interest claim. Pettiford asserts that his Sixth Amendment right to the effective assistance of counsel was violated because the Office of the Public Defender and his appointed trial attorney represented him subsequent to their representation of Pettiford's codefendant, Michael Quailes, in the same proceeding thus creating divided loyalties by their successive representation. Pettiford contends that this conflict prevented his appointed Public

Defender from being able to effectively cross-examine Quailes, who was the main witness against him at trial. Pettiford also argues that this counsel's performance at trial was deficient because he failed to request that a "limited" instruction being given to the jury regarding hearsay testimony and because he failed to call two witnesses. The State has responded to Pettiford's supplemental memorandum and has renewed its motion to affirm.

(5) Before we address the substantive merits of Pettiford's claims on appeal, we first consider the procedural requirements of Superior Court Criminal Rule 61.<sup>3</sup> Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is thereafter barred unless the movant can establish cause for the procedural default and prejudice. Pettiford's assertions that the prosecutor and the trial judge engaged in misconduct<sup>4</sup> were not raised at trial or on direct appeal. Accordingly, we find that these claims are procedurally barred by Rule 61(i)(3). Pettiford has failed to overcome this procedural hurdle.

(6) An application for postconviction relief alleging a conflict of interest claim must specifically identify the nature of the alleged conflict and make a concrete showing of actual prejudice, i.e., a defendant must establish that "an

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<sup>3</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>4</sup> These issues were raised in Pettiford's original opening brief on appeal.

actual conflict of interest adversely affected [trial counsel's] performance.”<sup>5</sup> Similarly, an application for postconviction relief alleging ineffective assistance of counsel must establish that: (i) trial counsel's representation fell below an objective standard of reasonableness; and (ii) but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different.<sup>6</sup> A defendant must set forth and substantiate concrete allegations of actual prejudice<sup>7</sup> in order to overcome the “strong presumption” that counsel's representation was professionally reasonable.<sup>8</sup>

(7) In this case, we agree with the Superior Court's conclusion that Pettiford failed to establish that his attorney had an actual conflict of interest arising from his prior representation of codefendant Quailes. The record reflects that the Public Defender's Office was counsel of record for Quailes from January 12, 2009 until February 26, 2009. At that time,<sup>9</sup> counsel filed a notice of conflict in the Superior Court, and another attorney, who was not employed by the Public Defender's office, was appointed to represent Quailes. Counsel stated that, during the six weeks that he was counsel of record for Quailes, he had never met with Quailes or obtained any information about the case. Pettiford offers nothing other than speculation to support his claim that counsel's brief representation of Quailes

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<sup>5</sup> *Lewis v. State*, 757 A.2d 709, 718 (Del. 2000).

<sup>6</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

<sup>7</sup> *Younger v. State*, 580 A.2d at 556.

<sup>8</sup> *Strickland v. Washington*, 466 U.S. at 689.

<sup>9</sup> Defense counsel's representation of Pettiford began on February 19, 2009.

created divided loyalties that prohibited counsel from effectively cross-examining Quailes at trial. We find nothing in the record to substantiate this conclusory allegation.

(8) Furthermore, we find no merit to Pettiford's assertions that his trial counsel's performance was constitutionally deficient. As the Superior Court noted, defense counsel's strategy at trial was to underscore the lack of physical evidence tying Pettiford to the alleged crimes. There was no fingerprint or forensic evidence and no witnesses, other than his two codefendants, who testified that Pettiford was present at the bank on the day the forged check was deposited. Pettiford was not shown in the bank surveillance videotape, and the State did not argue or present any evidence that Pettiford was the one who forged the signature on the stolen check. Given this reasonable strategy, we agree with the Superior Court that counsel committed no error in failing to call a handwriting expert or in failing to call the two witnesses identified by Pettiford, a bank employee and Pettiford's mother, who might have testified contrary to counsel's strategy.

(9) Finally, we find no merit to Pettiford's claim that counsel was ineffective for failing to request a "limited" instruction regarding hearsay. The alleged hearsay testimony came from a police officer who testified that a bank employee investigating the forged check told him that she had talked to Quailes and Quailes had told her that Pettiford was involved. This testimony was elicited

on cross-examination of the police officer by defense counsel. Accordingly, defense counsel had no basis to object or request that a limiting instruction be given to the jury. Furthermore, the bank employee's statement was not offered into evidence to prove the truth of the matter asserted and, thus, did not constitute inadmissible hearsay.<sup>10</sup> Moreover, Pettiford could not establish any prejudice from this testimony because Quailes, whose underlying statement to the bank investigator was really the hearsay statement at issue, testified at trial and was subject to cross-examination.<sup>11</sup>

(9) Having reviewed the parties' contentions and the record on appeal very carefully, we find it manifest that the judgment below should be affirmed on the basis of, and for the reasons set forth in, the Superior Court's well-reasoned decision dated February 15, 2011.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>10</sup> Del. Unif. R. Evid. 801(c) (2011).

<sup>11</sup> Del. Unif. R. Evid. 801(d)(1) (2011).